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No.

IN THE

Supreme Court of the United States

October Term, 1981

JOINT COUNCIL OF TEAMSTERS NO. 42, AND ITS AFFILIATED LOCAL UNIONS, SALES DRIVERS & DAIRY EMPLOYEES, LOCAL 166; GENERAL TRUCK DRIVERS, LOCAL 235; GENERAL TRUCK DRIVERS, CHAUFFEURS & HELPERS, LOCAL 692; CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL 186; BUILDING MATERIAL AND DUMP TRUCK DRIVERS, LOCAL 420; GENERAL TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS, LOCAL 982; TRUCK DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL 898; TEAMSTERS & WAREHOUSEMEN, LOCAL 381, ALL AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, LOCAL 87, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ASSOCIATED INDEPENDENT OWNER-OPERATORS, INC.,

Intervenor.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

BUILDING MATERIAL AND DUMP TRUCK DRIVERS, LOCAL 420, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AND ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC.; BUILDING INDUSTRY ASSOCIATION OF CALIFORNIA, INC.; ENGINEERING CONTRACTORS ASSOCIATION, INC.; SOUTHERN CALIFORNIA CONTRACTORS ASSOCIATION,

Respondents.

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ASSOCIATED INDEPENDENT OWNER-OPERATORS, INC., ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA DUMP TRUCK OWNERS ASSOCIATION,

Intervenors.

CALIFORNIA DUMP TRUCK OWNERS ASSOCIATION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ASSOCIATED INDEPENDENT OWNER-OPERATORS, INC.,

Intervenor.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Questions Presented for Review.

(1) WHETHER OWNER-OPERATORS ARE EMPLOYEES WITHIN THE MEANING OF SECTION 2(3) OF THE LABOR MANAGEMENT RELATIONS ACT.

(2) WHETHER THE NATIONAL LABOR RELATIONS BOARD ERRED IN LIMITING THE SCOPE OF THE CONSTRUCTION INDUSTRY PROVISO TO SECTION 8(e) OF THE LABOR MANAGEMENT RELATIONS ACT TO THE GEOGRAPHICAL SITE OF CONSTRUCTION.

(3) WHETHER THE NINTH CIRCUIT ERRED BY REQUIRING THE NATIONAL LABOR RELATIONS BOARD TO IMPOSE MONETARY DAMAGES FOR A VIOLATION OF SECTION 8(e) OF THE LABOR MANAGEMENT RELATIONS ACT ABSENT EVIDENCE OF COERCION.

Parties to the Proceeding.

The following are parties to this proceeding:

(1) Joint Council of Teamsters No. 42, and its affiliated local unions, Sales Drivers & Dairy Employees, Local 166; General Truck Drivers, Local 235; General Truck Drivers, Chauffeurs, & Helpers, Local 692, Chauffeurs, Teamsters and Helpers, Local 186; Building Material and Dump Truck Drivers, Local 420; General Teamsters, Chauffeurs, Warehousemen & Helpers, Local 982; Truck Drivers, Warehousemen and Helpers, Local 898; Teamsters & Warehousemen, Local 381, all affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; Teamsters, Chauffeurs, Warehousemen and Helpers, Local 87, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

(2) The National Labor Relations Board.

(3) The Associated General Contractors of California, Inc., the Building Industry Association of California, the Engineering Contractors Association and the Southern California Contractors Association.

(4) The Associated Independent Owner-Operators, Inc., the California Dump Truck Owners Association, and the Associated General Contractors of California Dump Truck Owners Association.

TABLE OF CONTENTS

	Page
Questions Presented for Review	ii
Parties to the Proceeding	iii
Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit	2
Opinions Below	3
Jurisdiction	3
Statutory Provisions Involved	4
Statement of the Case	5
A. Preliminary Statement	5
B. Statement of Facts	5
1. The Master Labor Agreement	5
2. The Owner-Operators	6
3. Related Decisions	8
4. The Present Controversy	11
C. Proceedings and Disposition Below	11
Argument	12
I.	
There Now Exists an Express Conflict Among the Circuits as to Whether the Owner-Operators Are Employees Within the Meaning of Section 2(3) of the Act	12
II.	
This Case Raises an Important Question Concerning the Scope of the Construction Industry Proviso Which Has Not Been Settled by This Court	14
III.	
There Now Exists an Express Conflict Among the Circuits as to Whether the Board May Decline to Order a Make-Whole Remedy for Violations of Section 8(e) of the Act Absent Coercion	16
IV.	
Conclusion	18

INDEX TO APPENDICES

Page

Appendix i. Opinion of the Ninth Circuit Court of Appeals ..... App. p. 1

Appendix ii. Decision and Order 12

Appendix iii. Pertinent Statutory Provisions Involved 45

29 U.S.C. § 152(3) 45

29 U.S.C. § 158(b)(4) 45

29 U.S.C. § 158(e) 47

29 U.S.C. § 160(c) 48

Appendix iv. Relevant Provisions of the MLA (Article xiii Owner-Operator) 50

TABLE OF AUTHORITIES

Cases — Page

Associated General Contractors of California, Inc. v. NLRB, 564 F.2d 271 (9th Cir. 1977) 10, 13

Associated General Contractors of California, Inc., 239 N.L.R.B. 686 (1978) 10

Associated Independent Owner-Operators, Inc. v. N.L.R.B., 407 F.2d 1383 (9th Cir. 1969) 8

Building Material and Dump Truck Drivers, Local 36 v. NLRB, 673 F.2d 550 (D.C. Cir. 1982), cert. granted, sub nom. Shepard v. NLRB, 50 U.S.L.W. 3915 (U.S. May 17, 1982) (No. 81-1627) 13, 17

Chapman v. Edwards, 133 Cal. App. 72, 24 P.2d 211 (1933) 8

Contractor Members of the Associated General Contractors of California, Inc., 201 N.L.R.B. 311 (1973) 9

Contractor Members of the Associated General Contractors of California, Inc., 209 N.L.R.B. 363 (1974) 9

Corning Glass Works v. Brennan, 417 U.S. 188, 94 S. Ct. 2223 (1974) 14, 18

Donald Shriver Inc. v. NLRB, 635 F.2d 859 (D.C. Cir. 1980), cert. denied, 101 S. Ct. 2058 (1981) 15

General Teamsters, Local 982 (J. K. Barker Trucking Co.), 181 N.L.R.B. 515 (1970) 8

Joint Council of Teamsters No. 42 v. NLRB, 450 F.2d 1322 (D.C. Cir. 1971) 9

Local 777, Democratic Union Organizing Committee v. NLRB, 603 F.2d 862 (D.C. Cir. 1978) 13

NLRB v. Bell Aerospace Co., 416 U.S. 267, 94 S. Ct. 1757 (1974) 12

NLRB v. Hendricks County Rural Electric, Membership Corp., 102 S. Ct. 216 (1981) 12

Page

NLRB v. United Insurance Co., 390 U.S. 254, 88 S. Ct. 988 (1968) 13

Operating Engineers, Local 12 (Associated Independent Owner-Operators, Inc.), 168 N.L.R.B. 863 (1967) reversing 181 N.L.R.B. 515 (1970) 8

Packard Motor Car Co. v. NLRB, 330 U.S. 485, 67 S. Ct. 789 (1947) 12

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 89 S. Ct. 1794 (1969) 12

United Insurance Co. v. NLRB 272 F.2d 446 (7th Cir. 1959) 13

Woelke & Romero Framing, Inc. v. NLRB, 50 U.S.L.W. 4358 (U.S. May 24, 1982) 15, 16

Rule

Rules of the United States Supreme Court, Rule 23 ... 18

Statutes

Labor Management Relations Act, Sec. 2(3) (29 U.S.C. § 152(3)(1976)) ..... ii, 4, 8, 12

Labor Management Relations Act, Sec. 8(a)(1) (28 U.S.C. § 158(a)(1) (1976)) 9, 10

Labor Management Relations Act, Sec. 8(a)(2) (29 U.S.C. § 158(a)(2) (1976)) 10

Labor Management Relations Act, Sec. 8(b)(4)(ii)(A) (29 U.S.C. § 158(b)(4)(ii)(A) (1976)) 4, 8, 11

Labor Management Relations Act, Sec. 8(e) (29 U.S.C. § 158(e) (1976)) ..... iii, 4, 5, 6, 11, 14, 16, 17

Labor Management Relations Act, Sec. 9(b) (29 U.S.C. § 159(b) (1976)) 12

Labor Management Relations Act, Sec. 10(c) (29 U.S.C. § 160(c) (1976)) 5

United States Code, Title 28, Sec. 1254(1) (1976) 3

United States Code, Title 29, Sec. 160(e) (1976) 5

United States Code, Title 29, Sec. 160(f) (1976) 5

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ers of America ("Unions") pray that *certiorari* issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in the above-entitled case.

OPINIONS BELOW.

The opinion of the Ninth Circuit Court of Appeals as amended on denial of rehearing and rehearing *en banc* is officially reported at 671 F.2d 305 (9th Cir. 1982).[1]

The decision and order of the National Labor Relations Board is officially reported at 248 N.L.R.B. 808 (1980).[2]

JURISDICTION.

On December 21, 1981 the Ninth Circuit Court of Appeals issued its decision granting enforcement in part of a decision and order of the National Labor Relations Board ("Board") and remanding the case to the Board for consideration of remedy.

On January 4, 1982 the Unions filed a petition for rehearing and suggestion for rehearing *en banc*.

On March 2, 1982 the Ninth Circuit filed an order denying the petition for rehearing and suggestion for rehearing *en banc* and amending the earlier decision.

On May 14, 1982 the Unions applied to this Court for an order extending the time in which to petition for *certiorari*. On May 18, 1982, the Honorable William H. Rehnquist, Associate Justice of this Court, granted an extension to July 1, 1982.

The date of entry of judgment is January 5, 1982.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1976).

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[1]The opinion is set forth in full in Appendix i.

[2]The decision and order is set forth in full in Appendix ii.

STATUTORY PROVISIONS INVOLVED.[3]

Section 2(3), 29 U.S.C. § 152(3) (1976), of the Labor Management Relations Act ("Act") provides in pertinent part:

> The term 'employee' shall . . . not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, *or any individual having the status of an independent contractor*, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined [emphasis added].

Section 8(e), 29 U.S.C. § 158(e) (1976), makes it an unfair labor practice for a union and an employer to enter into an agreement that requires self-employed persons to join the union in order to work for the employer:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract . . . whereby such employer . . . agrees to cease . . . doing business with any other person . . . .

The section is limited by the following:

> *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction.

It is a separate unfair labor practice pursuant to Section 8(b)(4)(ii)(A), 29 U.S.C. § 158(b)(4)(ii)(A) (1976), for a union to exert coercion in an effort to force or require an

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[3]The full text of each pertinent statutory provision appears in Appendix iii.

employer to enter into an agreement which is prohibited by Section 8(e):

> It shall be an unfair labor practice for a labor organization . . . (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is — (A) forcing or requiring any employer or self-employed person . . . to enter into any agreement which is prohibited by subsection (e) of this section . . . .

The Board's authority to remedy unfair labor practices is set forth in Section 10(c), 29 U.S.C. § 160(c) (1976):

> If . . . the Board shall be of the opinion that any person . . . has engaged in . . . such unfair labor practice, then the Board shall . . . issue and cause to be served . . . an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter . . . .

STATEMENT OF THE CASE.

A. Preliminary Statement.

This case came to the Ninth Circuit on cross-petitions for enforcement and review of a decision and order of the Board.

The basis for jurisdiction in the Ninth Circuit was 29 U.S.C. § 160(e) and (f) (1976).

B. Statement of Facts.

1. The Master Labor Agreement.

The Unions and the Associated General Contractors of California, Inc. ("AGC"), the Building Industry Association of California ("BIA"), the Engineering Contractors Association ("ECA") and the Southern California Con-

tractors Association ("SCCA") entered into a collective bargaining agreement known as the Southern California Master Labor Agreement ("MLA") on or about July 1, 1977. The MLA was entered into by the Unions on behalf of covered employees and by the AGC, BIA, ECA and SCCA on behalf of their employer-members in the construction industry in Southern California, excluding San Diego County.

The MLA required the employer-members to carry owner-operators[4] on their payroll as employees and to apply all the terms and conditions of the MLA, including the union security provisions, to owner-operators.

Certain terms and conditions of the MLA, when applied to owner-operators, were found by the Board to be violative of Section 8(e) of the Act and not protected by the construction industry proviso to Section 8(e).[5] Specifically, the Board found the pertinent provisions of the MLA to be secondary because the owner-operators had been found by the Ninth Circuit to be independent contractors in an earlier case and it held the scope of the provisions to be overbroad because they were not limited to the geographical site of construction.

2. The Owner-Operators.

The owner-operators perform loading, hauling and unloading of construction materials for the employer-members using dump-truck equipment. The equipment varies, but often includes a tractor, semitrailer, truck and transfer

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[4]An owner-operator is defined by the MLA as "an individual that holds legal or registered title to a motor vehicle or to the power equipment unit thereof in his name and who personally drives such vehicle or unit in the performance of work covered by this Agreement." Article XII, Section 1300. See Appendix iv, *infra*.

[5]Relevant provisions of the MLA are set forth in full in Appendix iv.

trailer, a tractor with a bottom dump trailer, semibottom dump trailer or a truck and pup trailer. Some of the equipment used by the owner-operators is leased.

The employer-members utilize the owner-operators for all types of construction projects. However, their basic function is the same: the loading, hauling and unloading of materials between two sites. In some instances all their work is performed at the geographical site of construction; at other times it includes travel away from jobsites for dumping and hauling materials from "borrow pits" to jobsites.

In some instances, the employer-members supplement their regular hauling needs by using owner-operators together with their own driver-employees in company-owned trucks to work on the same construction project at the same time as the owner-operators. In those instances, owner-operators work side-by-side with the other drivers, observing the same starting and quitting times and breaks and following the same somewhat detailed instructions given by the employer-members' supervisory personnel who oversee the performance of all drivers working on the jobsite. If they fail to observe these instructions, they are subject to the same disciplinary action as the other drivers.

In most cases, the owner-operators have not contracted directly with the employer-members. Instead, they are brought to jobsites of employer-members by brokers who contract directly with the employer-members and have sub-haul arrangements with the owner-operators.

The California Public Utilities Commission tariff establishes the minimum hourly rate normally received by the owner-operators. However, there are instances where they have received a higher hourly rate.

3. Related Decisions.

Although the owner-operators have traditionally been covered by successive MLAs, their employment status first became the subject of serious controversy over a decade ago.

In 1965, Associated Independent Owner-Operators ("AIOO"), a voluntary association representing a minority of the owner-operators, filed unfair labor practice charges with the Board alleging violations of Section 8(b)(4)(ii)(A) of the Act against the Unions. In pertinent part, AIOO alleged that the Unions had engaged in unlawful secondary conduct to compel some of the owner-operators to become union members by coercing employer-members to cease doing business with those owner-operators who were not union members. The basis for the allegation was AIOO's contention that the owner-operators were independent contractors and were therefore self-employed persons and not employees within the meaning of Section 2(3) of the Act.

The Board had not previously considered the employment status of the owner-operators[6] although, in an earlier case, it had ruled that other owner-operators (not doing hauling work) were employees rather than independent contractors.[7]

Thus, in 1970 the Board first examined the employment status of the same owner-operators involved in this case and concluded that they were not independent contractors but were employees.[8]

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[6]Under California law the question has been settled for nearly fifty years. In California courts, the owner-operators are employees. *Chapman v. Edwards*, 133 Cal. App. 72, 24 P.2d 211, 214 (1933).

[7]*Operating Engineers, Local 12 (Associated Independent Owner-Operators, Inc.)*, 168 N.L.R.B. 863 (1967).

[8]*General Teamsters, Local 982 (J.K. Barker Trucking Co.)*, 181 N.L.R.B. 515 (1970).

Note, that the Board's decision was made with due regard for the Ninth Circuit's decision on review of the *Operating Engineers* case (*supra* n. 7), reversing that case. *See* n. 5 in 181 N.L.R.B. 515 (1970), citing *Associated Independent Owner-Operators, Inc. v. NLRB*, 407 F.2d 1383 (9th Cir. 1969).

AIOO obtained review of the Board's decision in the District of Columbia Circuit Court of Appeals. The D.C. Circuit reviewed the evidence and the legal standard applied by the Board and affirmed the Board's finding that the owner-operators were employees.[9]

Review of the D.C. Circuit holding was not sought in this Court. Instead, in 1971 the owner-operators filed petitions to decertify the Unions as their bargaining representative with the Board. In their petitions, the owner-operators asserted, contrary to the Board and the D.C. Circuit, that they were independent contractors. Alternatively, they argued that in the event the Board again found them to be employees, a substantial number of them no longer wished to be represented by the Unions.

Again, the Board independently reconsidered the status of the same owner-operators and again the Board concluded that they were employees.[10] A direction of election was subsequently issued on March 5, 1974.[11]

The existing MLA was due to expire on June 30, 1974. Consequently, the Unions and the AGC, BIA, ECA and SCCA entered into negotiations and, on July 1, 1974, executed a new MLA.

Because the new MLA covered the owner-operators and because the elections which had been directed by the Board had not yet been held, AIOO filed new unfair labor practice charges against the AGC, BIA, ECA and SCCA alleging unlawful assistance to the Unions pursuant to Section 8(a)(1)

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[9] *Joint Council of Teamsters No. 42 v. NLRB*, 450 F.2d 1322 (D.C. Cir. 1971).

[10] *Contractor Members of the Associated General Contractors of California, Inc.*, 201 N.L.R.B. 311 (1973).

[11] *Contractor Members of the Associated General Contractors of California, Inc.*, 209 N.L.R.B. 363 (1974).

and (2) of the Act, 29 U.S.C. § 158(a)(1) and (2) (1976). The charges blocked further processing of the election.

The Board found that unfair labor practices had been committed[12] and cross-petitions for enforcement and review were filed in the Ninth Circuit. The Ninth Circuit thereupon abruptly substituted its judgment for the studied, twice-considered judgment of the Board and D.C. Circuit and found the same owner-operators previously declared to be employees to be independent contractors.[13] Ironically, the Ninth Circuit referred to the Board and to the D.C. Circuit as having been "blinded" in their earlier appraisals.[14]

The Ninth Circuit remanded the case to the Board and the Board consolidated the case with the election case which had been held in abeyance. The Board then issued a supplemental decision and order in which it automatically accepted the Ninth Circuit's view as the "law of the case" (although not the Board's law) and dismissed all outstanding proceedings.[15]

At this point in the controversy, the Unions had no opportunity to seek review of the Ninth Circuit's decision because they were technically prevailing parties.[16]

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[12]*Associated General Contractors of California, Inc. (Teamsters, Local 94)*, 220 N.L.R.B. 540 (1975).

[13]*Associated General Contractors of California, Inc. v. NLRB*, 564 F.2d 271 (9th Cir. 1977).

[14]*See AGC v. NLRB, supra* 564 F.2d at 282 n. 11.

[15]*Associated General Contractors of California, Inc.*, 239 N.L.R.B. 686 (1978).

[16]The Unions had opposed the election petitions and had intervened in the unfair labor practice proceedings on the side of the Respondent employers seeking dismissal of the petitions because of the lack of a question concerning representation and seeking dismissal of the unfair labor practice charges.

4. The Present Controversy.

Following this abrupt turn of events, the owner-operators filed the instant unfair labor practice charges alleging that the provisions of the latest MLA executed on July 1, 1977, which covered the owner-operators, violated Section 8(e).[17]

C. Proceedings and Disposition Below.

The Unions argued before the Board that the owner-operators were employees and, alternatively, that the pertinent provisions of the MLA were within the scope of the construction industry proviso to Section 8(e). The Board refused to review the status of the owner-operators and found the provisions overbroad.

Upon review, the Ninth Circuit affirmed the Board's refusal to reconsider the employment status of the owner-operators and affirmed the Board's conclusion that the proviso was inapplicable. Contrary to the Board, however, the Ninth Circuit concluded that a make-whole remedy could be appropriate and remanded the case to the Board to fashion a make-whole remedy or show cause why not.

The Unions now seek review of the Ninth Circuit's decision and judgment in its entirety.

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[17]A single, isolated allegation of Section 8(b)(4)(ii)(A) conduct was also alleged against one of the affiliated local unions due to an alleged threat by one of the local's business representatives against one of the employer-members concerning its use of one owner-operator. No coercive conduct in connection with the execution of the MLA was alleged.

ARGUMENT.

This writ should be allowed for the following reasons:

I.

There Now Exists an Express Conflict Among the Circuits as to Whether the Owner-Operators Are Employees Within the Meaning of Section 2(3) of the Act.

After more than a decade of controversy, the Unions, the employer-members and the owner-operators are no closer to a final resolution of their dispute than when it began.

Twice the Board independently considered the employment status of the owner-operators. After having developed a full evidentiary record in those cases and after carefully applying its precedents in each case, it concluded that they were employees.

Upon review of the Board's interpretation, the applicable canon of statutory construction requires that "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong . . . ." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381, 89 S. Ct. 1794, 1802 (1969). That canon has particular applicability to cases where the Board construes the scope of Section 2(3). *See NLRB v. Hendricks County Rural Electric Membership Corp.*, 102 S. Ct. 216, 222 (1981); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275, 94 S. Ct. 1757, 1762 (1974). Such matters of interpretation flow from the Board's broad authority, under Section 9(b) of the Act, 29 U.S.C. § 159(b) (1976), to determine the scope of appropriate collective bargaining units. *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491, 67 S. Ct. 789, 793 (1947).

Thus, where the Board has determined that certain persons are employees rather than independent contractors, "[s]uch a determination should not be set aside just because a court would, as an original matter, decide the case the other way." *NLRB v. United Insurance Co.*, 390 U.S. 254, 260, 88 S. Ct. 988, 991 (1968).

Here, the Board compounded the Ninth Circuit's earlier error in *Associated, supra*, 564 F.2d at 282 (substituting its judgment for the Board's) by its automatic acquiescence to the Ninth Circuit without further investigation and in complete disregard of its statutory responsibility. In doing so, the Board denied the Unions procedural due process just as it did to United Insurance Company prior to this Court's review. *See United Insurance Co. v. NLRB*, 272 F.2d 446, 449 (7th Cir. 1959) (previous Board decision in representation matter adverse to employer "could not serve as a substitute for evidence" in subsequent unfair labor practice matter where employer had no opportunity to seek review of adverse decision).

The Ninth Circuit's present decision, affirming the Board's acquiescence, repeats the denial of due process and, more importantly for this Petition, firmly re-establishes an express conflict with the D.C. Circuit's holding on precisely the same subject.[18]

Now,[19] the Unions are able to seek resolution of this conflict before this Court.

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[18]The D.C. Circuit has continued to adhere to its decision where applicable. *See Local 777, Democratic Union Organizing Committee v. NLRB*, 603 F.2d 862, 899 n. 29 (D.C. Cir. 1978). *But cf. Building Material and Dump Truck Drivers, Local 36 v. NLRB*, 673 F.2d 550 (D.C. Cir. 1982), (construing language of the San Diego MLA not involved in this case), *cert. granted, sub nom. Shepard v. NLRB*, 50 U.S.L.W. 3915 (U.S. May 17, 1982) (No. 81-1627).

[19]See n. 16, *supra*.

Because of this "unusually direct conflict between two circuits," the Unions respectfully request that *certiorari* issue. *Corning Glass Works v. Brennan*, 417 U.S. 188, 191, 94 S. Ct. 2223, 2226 (1974).

II.

This Case Raises an Important Question Concerning the Scope of the Construction Industry Proviso Which Has Not Been Settled by This Court.

Based upon its original finding that the owner-operators were independent contractors, the Ninth Circuit affirmed the Board's finding that provisions of the MLA requiring union membership were secondary when applied to the owner-operators.

The Unions agreed that if the owner-operators were independent contractors, the provisions were secondary but argued that the provisions were protected by the proviso to Section 8(e) which excludes "an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work . . . ."

The Board found the proviso inapplicable because some of the owner-operators do not do all their work at the *geographical* site of construction: "The primary purpose of the construction industry proviso — to avoid tensions among groups of employees at the same site — has little relevance to persons having such incidental contact with the site . . . [w]e find that such work is not . . . within the meaning of the . . . proviso."[20]

The Ninth Circuit glibly condensed the Board's holding: "On these facts, the Board found that the owner-operators

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[20] *See infra*, Appendix ii.

are delivery persons, not construction site workers, and therefore their work is not covered by the on-site proviso"[21] and affirmed.

In this term, this Court has stated that "the proviso is only partly concerned with jobsite friction." *Woelke & Romero Framing, Inc. v. NLRB*, 50 U.S.L.W. 4538, 4542 (U.S. May 24, 1982). Moreover, simultaneous physical presence on the jobsite (*i.e.* "cheek-by-jowl" proximity) should not be given conclusive weight. *See Donald Shriver Inc. v. NLRB*, 635 F.2d 859, 883-84 (D.C. Cir. 1980) ("The entire thrust of the proviso . . . is that craft work on a construction site cannot be treated as isolated and removed from other craft work"), *cert. denied*, 101 S. Ct. 2058 (1981) petition for reconsideration pending. Thus, if the work performed by the owner-operators *originates* from the geographical site of construction, the applicability of the proviso should not depend upon the quantity of physical presence but upon the quality. Such an appraisal will not "ignore the realities of employment situations on a construction jobsite", *Id.* at 883, as does the Ninth Circuit's here.

The reality here (which has been ignored to date) is that unregulated use of the owner-operators poses a serious threat to established contract standards and allows work traditionally considered as construction work to be done by union

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[21] *See infra*, Appendix i. Note that the Ninth Circuit's characterization of the owner-operators as "delivery persons" is plainly wrong and contrary to the Board's decision. The Board did not conclude that the owner-operators were delivery persons. Rather, the Board analogized its prior holdings regarding delivery persons to the owner-operators and concluded that the *same result* was warranted. Delivery persons in those cases analogized by the Board are those whose work assignments do not originate at the site of construction and who are not under the routine control of the jobsite contractors. For reasons most appropriately stated upon briefing the merits, the Unions vigorously argue that these factors critically distinguish the owner-operators from delivery persons.

workers alongside non-union workers on the same construction jobs at the same time. The Unions assert that these are evils intended by the proviso to be eliminated.

Moreover, this Court made clear in *Woelke & Romero*, that the intent of the proviso was not to change the practices of the construction industry but, rather, to include those practices within the proviso and immunize them from the effects of Section 8(e). *Id.* at 50 U.S.L.W. 4541. Because the owner-operators have historically been covered by successive MLAs, this case allows the Court to provide further guidance consistent with that intent by deciding whether Congress intended to strictly limit the proviso to the *geographical* site of construction.

An important question of federal labor law is presented, deserving of this Court's consideration.

III.

There Now Exists an Express Conflict Among the Circuits as to Whether the Board May Decline to Order a Make-Whole Remedy for Violations of Section 8(e) of the Act Absent Coercion.

The Ninth Circuit disagreed with the Board that a cease and desist order was the appropriate remedy for the violation of Section 8(e).

The California Dump Truck Owners Association ("CDTOA"), representing some of the owner-operators, argued before the Board that the appropriate remedy required the Unions to reimburse the owner-operators for payment of initiation fees and dues, deducted contributions to union benefit funds and income lost by reason of the enforcement of the provisions of the MLA.[22] The Board denied

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[22]Note that there was no evidence before the Board of payment by any owner-operators of contributions to benefit funds; nor was there any evidence of lost income. The Ninth Circuit stated "no opinion . . . as to whether the Board should order compensation for lost income . . . ." *infra*, Appendix i, n. 12.

the requested remedy because of the lack of evidence of losses directly attributable to coercion, because the remedial issue had not been expressly litigated and because "we find a reimbursement order, typically used to 'make whole' *employees* for violations of the Act, to be generally overly broad and inappropriate in the context of 8(e) violations [emphasis in text]."[23]

The Ninth Circuit independently opined that specific evidence of coercion was not necessary and therefore remanded the case to the Board "to fashion a make-whole remedy or show cause why such a remedy would not effectuate the policies of the Act."[24]

Upon similar facts, the D.C. Circuit recently ruled, expressly contrary to the Ninth Circuit, that the Board's decision to impose a cease and desist order should not be disturbed. *Building Material and Dump Truck Drivers, Local 36 v. NLRB, supra* 673 F.2d at 550.[25]

In this term, this Court has recently granted *certiorari* to review the D.C. Circuit holding.[26] Inasmuch as the parties in the D.C. Circuit case have, in substantial part, relied upon the Ninth Circuit's ruling here, to justify their respective positions,[27] it is respectfully requested that this Court decide the question fully by granting *certiorari* and

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[23]*See infra*, Appendix ii.

[24]*See infra*, Appendix i.

[25]Although the opinion remains officially unreported, it is unofficially reported at 108 L.R.R.M. 3153 (1981). See also decision below expressly stating its disagreement with the D.C. Circuit *infra* at n. 13, Appendix i.

[26]*Building Material and Dump Truck Drivers, Local 36 v. NLRB*, 673 F.2d 550 (D.C. Cir. 1982), *cert.* granted *sub nom. Shepard v. NLRB*, 50 U.S.L.W. 3915 (U.S. May 17, 1982) (No. 81-1627).

[27]Coercive conduct does not distinguish the two cases. See n. 17, *supra*. There is no evidence here of coercive conduct in connection with the execution of the MLA. Also, note that the D.C. Circuit holding concerns the San Diego County MLA, not applicable here.

ordering this case consolidated for hearing with the D.C. Circuit case pursuant to Supreme Court Rule 23.

The Court would then have complete facts upon which to resolve this express conflict between the Circuits. *See Corning Glass, supra* 417 U.S. at 191, 94 S. Ct. at 2226.

IV.
Conclusion.

For the foregoing reasons, the Unions respectfully request that *certiorari* issue to review the decision below.

Respectfully submitted,

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Helpers of America; Teamsters, Chauffeurs, Warehousemen and Helpers, Local 87, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.